

SENATE RECORD VOTE ANALYSIS

105th Congress
1st Session

Vote No. 59

May 7, 1997, 2:46 pm
Page S-4069 Temp. Record

FY 97 SUPPLEMENTAL APPROPRIATIONS/Public Lands Rights-of-Way

SUBJECT: Supplemental Appropriations and Rescissions Act for fiscal year 1997 . . . S. 672. Stevens motion to table the Bumpers amendment No. 64.

ACTION: MOTION TO TABLE AGREED TO, 51-49

SYNOPSIS: As reported, S. 672, the Supplemental Appropriations and Rescissions Act for fiscal year (FY) 1997, will provide emergency disaster funding, funding for continuing military operations in Bosnia and Iraq, and supplemental funding. Budget authority (BA) offsets also will be provided. Other bill provisions include funding for highways and veterans, and a provision to prevent a Government shutdown by providing continuing funds if appropriations are not passed by October 1, 1997.

The Bumpers amendment would strike section 310. Section 310 will prohibit the use of funds to promulgate or to implement "any rule, regulation, policy, statement, or directive issued after October 1, 1993" regarding the rights-of-way originally granted in Revised Statutes (R.S.) 2477. (R.S. 2477 allowed public routes to be established and developed across Federal public lands that had not been reserved by the Federal Government for other purposes. Those routes were established and developed in accordance with applicable State laws. In 1976, R.S. 2477 was repealed, but all existing routes were grandfathered. Interior Secretary Babbitt has attempted to change this situation with regulations that would give the Federal Government, instead of State governments, control over determining any routes, improvement to routes, or maintenance of routes that would be allowed. Congress has responded by passing three separate bills to stop such regulations from being promulgated. In January of this year, Secretary Babbitt issued a policy statement that said that the Federal Government, not State governments, would make rights-of-way determinations.

Those favoring the motion to table contended:

Senators should not underestimate the gravity of this issue. Environmental extremists inside and outside the Government are trying to depopulate the Western and the Northern States. In the process, they are showing a total disregard for the constitutional and federal principles on which our Nation is founded. We live in the United States of America, not the Eastern States plus the Vassal States

(See other side)

YEAS (51)			NAYS (49)			NOT VOTING (0)	
Republicans (48 or 87%)		Democrats (3 or 7%)	Republicans (7 or 13%)	Democrats (42 or 93%)		Republicans (0)	Democrats (0)
Abraham	Helms	Conrad	Chafee	Akaka	Kennedy		
Allard	Hutchison	Dorgan	Collins	Baucus	Kerrey		
Ashcroft	Inhofe	Inouye	Frist	Biden	Kerry		
Bennett	Kempthorne		Hutchinson	Bingaman	Kohl		
Bond	Kyl		Jeffords	Boxer	Landrieu		
Brownback	Lott		Roth	Breaux	Lautenberg		
Burns	Lugar		Snowe	Bryan	Leahy		
Campbell	Mack			Bumpers	Levin		
Coats	McCain			Byrd	Lieberman		
Cochran	McConnell			Cleland	Mikulski		
Coverdell	Murkowski			Daschle	Moseley-Braun		
Craig	Nickles			Dodd	Moynihan		
D'Amato	Roberts			Durbin	Murray		
DeWine	Santorum			Feingold	Reed		
Domenici	Sessions			Feinstein	Reid		
Enzi	Shelby			Ford	Robb		
Faircloth	Smith, Bob			Glenn	Rockefeller		
Gorton	Smith, Gordon			Graham	Sarbanes		
Gramm	Specter			Harkin	Torricelli		
Grams	Stevens			Hollings	Wellstone		
Grassley	Thomas			Johnson	Wyden		
Gregg	Thompson						
Hagel	Thurmond						
Hatch	Warner						

EXPLANATION OF ABSENCE:

1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:

AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

of America. In this particular case, 130 years of precedent, specific court rulings, and detailed statutory prohibitions are being flaunted in an effort to make life difficult or impossible in much of the West by greatly restricting the freedom of movement. Specifically, the Clinton Administration is attempting to assert Federal control over determining where and how people may travel across Federal public lands in their States, because it will then be able to shut down rights-of-way that have existed for more than 100 years. Interior Secretary Babbitt, to his typical great discredit, is of course leading the charge. For States such as Arkansas, which have well developed, extensive highway systems and very little public lands, making this change would be virtually meaningless. For the Western States and Alaska, though, it would be a disaster, at least as long as Secretary Babbitt heads the Interior Department.

By way of background, in 1866 the Federal Government enacted a statute stating that rights-of-way for the construction of highways were granted for any public lands not otherwise reserved for public uses. The purpose of that law was to encourage the settlement of the Western States, which were largely owned by the Federal Government. People would not be willing to settle in the pockets of State and private lands if they were then trapped in those lands because they were not allowed to travel across the surrounding Federal lands. The traditional definition for "highway"--a route--was obviously meant. Certainly we were not talking about asphalt superhighways, because cars had not even been invented. From the beginning, the Federal Government stayed out of deciding if a right-of-way had been established. Individual States made their determinations. As States followed their natural courses of development, and as people established routes between areas as a result of that development, rights-of-way across public lands naturally arose. Footpaths, mail routes, rail lines, trapper routes, and every other means of travelling from place to place constituted routes. Once routes were established, States had full rights to develop them as necessary to accommodate growing use. Thus, just as Arkansas grew and traditional footpaths, wagon routes, and pig paths gradually expanded over the years to become a modern highway system, routes in the Western States were, and are, allowed to expand to accommodate growth. In 1938, the Federal Government established explicit regulations saying that it had nothing to do with deciding if a route had been established; in every case, State law controlled. In 1976, the Federal Government repealed the statute granting rights-of-way, but in 3 separate sections of that repeal it made clear that all existing rights-of-way remained in effect. In 1988, Interior Secretary Hodel, after consultation with the States, announced the Interior Department's policy on recognizing existing rights-of-way. That policy was entirely consistent with the law, prior regulations, and prior practices. It basically restated in a clear and concise manner a 122-year-old policy.

Many of the Western States, collectively known as the Frontier States, are still largely undeveloped. The communities that exist are separated by broad expanses of Federal lands. People cross those lands on routes that have been used for decades, and in many cases those routes are little more than trails. Some isolated communities could not exist if it were not for access to them on highways crossing Federal lands--cutting those highways would be like cutting their jugular veins. Alaska in particular is undeveloped. In area, it comprises one-fifth of the United States, yet it has only 13,000 miles of paved roads. Most of its routes are rugged trails over which no vehicle has ever travelled.

With this background, we now turn to the actions of Secretary Babbitt. Starting in 1993, Secretary Babbitt has tried to assert that the Federal Government has control over determining valid rights-of-way. He has blocked Federal action on right-of-way claims by States, and at the same time he has insisted that States cannot act on developing or maintaining rights-of-way without Federal approval. After setting up this Catch-22 situation, he has had the Federal Government sue State or local governments that have taken such simple actions as improving existing highways across Federal lands to make them safer. At the same time, he has tried to push through regulations that directly violate the law, 130 years of precedent, and numerous court decisions, by asserting that the Federal Government, not the States, will decide which existing claimed rights-of-way are valid. On three separate occasions Congress has acted to restrain him by passing laws to stop him from promulgating regulations on rights-of-way. On the third occasion, it passed an explicit, permanent prohibition on new regulations without express prior statutory permission. In January of this year, Secretary Babbitt tried a new twist. He issued a new policy statement that asserts that the Federal Government has control, and that it will only recognize rights-of-way that have been used by vehicles. His policy, unlike Secretary Hodel's policy in 1988, contravenes 130 years of court decisions, regulations, and specific laws that give States the sole right to define what constitutes rights-of-way. His policy, which States had no input in developing, also is a deliberate attempt to thwart the three separate laws passed by Congress since 1993 barring him from changing regulations. The lawerly artifice of changing a policy instead of a regulation is an abuse of the democratic process. The Executive Branch does not have the right to make up its own laws; it must enforce the laws as passed by Congress.

Over the span of the past 130 years, many new national parks, monuments, wilderness areas, and similar designations have been made. Most of those designations have included land that had valid existing rights-of-way. It is this fact on which our colleagues base their argument that the Federal Government should have the right to control the designations of valid routes. They say that without the Federal Government in charge, States are likely to run interstates through Yellowstone and pave over Old Faithful, and that Alaska will run "a million miles" of roads through pristine wilderness. In response, in the past 130 years States have not seen fit to take such idiotic actions, and they are not about to start. As for Alaska building a million miles of roads, it only has 13,000 miles now, and the last highway it built cost it more than \$6 million per mile. At that price, it would cost it roughly \$6 quadrillion to do what our colleagues say it is contemplating. We think that even the most liberal Democrats would blink at spending 4,000 times as much as the entire U.S. budget to build roads. Obviously, the entire premise on which the Bumpers amendment is supposedly based is fraudulent.

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However, there is another reason, not often publicly stated, for giving the Federal Government control. That reason is that if the Federal Government can control movement in the Western States, it can stop that movement and thus make it economically impossible to live there. Many environmentalists openly advocate stopping mining, grazing, logging, and all other uses of the West except for tourism in a few select areas. The principle of federalism means nothing to these environmentalists--the wishes of the people of those States do not matter to them because they do not think those people should be there in the first place. Their policy is the American version of ethnic cleansing, but instead of being aimed at particular ethnic groups, all people in the West are targeted.

Environmentalists, and this Administration, have conducted a relentless war on the Western States. The latest assault in that war is Secretary Babbitt's policy statement. Section 310 of this Act will invalidate that statement. We strongly support that section, and thus urge our colleagues to table the Bumpers amendment to strike it from the bill.

Those opposing the motion to table contended:

Section 310 of this bill, if it is not stricken, will give States the exclusive right to determine what a right-of-way across public lands is. Individual States will determine what will happen to the thousands of rights-of-way that cross national parks, wilderness areas, monuments, and other lands in the West that were set aside after those claimed rights-of-way existed. Though our colleagues may find it hard to believe, until Secretary Babbitt issued his policy this year it would have been totally legal for a State to pave over any pristine wilderness it wanted to as long as it claimed it was just paving over a route that had ever been used prior to 1976. Amazingly, a State could say virtually anything was a route--a gravel road, an old rail line, a footpath, or even a little path that had at one time been used for herding pigs. It could then expand that route into a huge superhighway if it so wished. Some of our colleagues say that this is a States' right issue, but we remind them that Federal lands belong to all the people of America, not just the particular people of a State in which those lands are located. The Grand Canyon, Yosemite, the Mojave Desert, and countless other national treasures belong to all Americans. Those Americans, through their Federal Government, should have the right to say if national treasures are going to be despoiled with highways and bridges.

For decades, no one in the Federal Government looked at this issue squarely. Finally, in 1988, Secretary of the Interior Hodel issued a policy that said bluntly that the States could put roads across any Federal lands that they wished just so long as the States said that they were building on routes that existed before 1976. Secretary Hodel, in issuing that policy, totally caved in to pressure from the Western States. He put those States' interests ahead of the interests of the American people who owned the land.

This year, after being repeatedly blocked by Congress in efforts to enact sensible regulations on rights-of-way, Secretary of the Interior Babbitt instead issued a new policy. That policy will put the Federal Government in charge of deciding which rights-of-way may be expanded. For instance, if California comes to the Federal Government now and tells it that it intends to build a highway through Yosemite National Park, the Federal Government will have the right to refuse to let California proceed. Senators from States with large amounts of Federal lands have set up a predictable howl that Secretary Babbitt would issue such a sensible policy, but he has refused to yield. We think he deserves a medal for his courage.

The new policy will only allow the recognition of rights-of-way that have been used for vehicle traffic. This distinction is of great importance. Without it, States like Alaska will be able to turn dog-sled routes, footpaths, and numerous other vaguely marked routes into modern superhighways. Literally 1 million miles of roads in Alaska alone may be built through pristine wilderness areas. If Senators care anything about the environment they should act to prevent this result.

On one point all Senators should agree--this issue is controversial. Secretary Babbitt has already advised the President to veto this bill if section 310 is retained. Attaching such a highly controversial provision to a must-pass, emergency supplemental bill is inappropriate. Therefore, in order to protect the environment, and to make sure that this bill is not vetoed, we should vote against the motion to table the Bumpers amendment.